



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1583 OF 2013

KOKI MUIA.....CLAIMANT

VERSUS

SAMSUNG ELECTRONICS EAST AFRICA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 2nd October 2013 seeking the determination of an issue she framed as wrongful and unfair termination of employment. She pleaded that she was employed by the Respondent from January 2011 and dutifully served the Respondent. She averred that during her service she was able to grow the Respondent's business in key areas. She averred that sometime in December 2012 a Mr. Nicky Choi a service dispatcher was posted to Nairobi and it was apparent that Choi was hopelessly incompetent and lacked basic knowledge necessary for the running or supporting the Claimant's department. She averred that this led to the directive by the Respondent's managing director Mr. Chong Yi to the Claimant to report directly to him. The Claimant pleaded that she went on leave between 5th and 29th July 2013. She averred that on 6th August 2013 she received a notice to show cause on an allegation that she had issued several verbal directions to procure service cancellations at the Global Service Network Platform, a system that the Respondent's warranty service partners use to log in repair claims for potential compensation upon further approval. The Claimant averred that she sought legal advice on the notice to show cause and after exchange of correspondence between counsel for the Claimant and the Respondent she was issued with a letter of termination dated 20th August 2013. The Claimant averred that the dismissal was discriminatory and made in bad faith, sexist and racist. She pleaded that it is not possible to issue verbal instructions as the platform upon which the Respondent's business is conducted cannot be interrogated or manipulated in such manner as to cause the verbal instructions to be corruptly manipulated into the system. She averred that the real motivation was to get rid of her as she was resolute against the imposition of an incompetent service provider where the Respondent's Managing Director had a vested interest. The Claimant averred that she was thus discriminated against on the basis of gender, nationality and colour. She thus sought damages for wrongful damages for the termination of her employment, the declared quarter bonus being one month salary, one month notice and the salary for the month of August 2013, reinstatement, certificate of service, costs of the suit and interest.

2. The Respondent filed its defence on 5th November 2013 and averred that the Claimant was its employee from 24th January 2011. The Respondent averred that programmes established and undertaken under the service department of which the Claimant was a mere member were undertaken under the direction of the hierarchical management and all times the Claimant worked with a team and as such cannot take personal credit for the success or otherwise of the service department team. The Respondent pleaded that at no times was the Claimant mandated to initiate and run a programme alone. The Respondent denied the averments of the Claimant in respect to the operations of the Respondent and averred that Il-Gyu (Nicky) Choi had obvious language difficulties upon relocating to Kenya and that his technical expertise has never been called into question having served the Respondent's global headquarters. The Respondent averred that before the tenure of Choi there was a Mr. Ji Moon Jang who had more experience and who to a large extent undertook tasks that were meant for the Claimant such that she had grown into a comfort zone. The Respondent averred that the Claimant's employment was fraught with difficulty and that there were a number of employees of the Respondent who resigned from the Respondent's employ due the Claimant's highhandedness. The Respondent averred that there were numerous complaints against the Claimant culminating in a meeting on 27th June 2013 between the Respondent's service team and the Respondent's Human Resource Manager Irene Gikemi. The Respondent averred that the appraisal of the Claimant revealed several lapses in judgment and technical errors. The Respondent averred that there was a disciplinary meeting held in the presence of the Claimant, Mr Chong Yi, Mr. Robert Ngeru and Ms Irene Gikemi. The Respondent pleaded that the Claimant in complete breach of her duties and with the intent of falsifying performance records for her own selfish ends unscrupulously directed her service team members to cancel service jobs with the aim of falsely showing that the team's turnaround time was improving and result in a positive reflection in the Claimant's performance. The Respondent averred that there was no reluctance to allowing the Claimant to take her annual leave and that leave was taken at the convenience of the Claimant. The Respondent pleaded that the Claimant was given a show cause letter dated 6th August 2013 and the Claimant was given an opportunity to explain herself and the instructions to her advocates was a ploy to escape answering the charges leveled. The Respondent averred that there was a valid and reasonable basis for the termination of the Claimant.
3. The Claimant testified on 20th March 2013. The Claimant narrated her work history from the days at Nokia to when she joined the Respondent in 2011. The Claimant testified that she was diligent in her service and was successful in reviews undertaken by the Respondent. She testified that there was no indication that her work performance was poor and that she had no previous notifications on poor performance. She stated that when she resumed from her leave she was unable to access her email and the laptop was taken to IT to resolve but even in the evening it could not access email. She testified that the next day she was given a letter by the HR Manager and asked to leave and act on the request in the letter. It was a show cause letter and she was in shock on reading the contents and sought legal advice and that the letter was responded to by her lawyer. The lawyer asked the Respondent to give the details regarding the persons she gave verbal instructions to and when she gave the verbal instructions to. She stated that the Respondent never responded to that request. She testified that it is not possible to give verbal instructions to change anything in the system which captured the activities of the service partners. She referred to emails in which she had given instructions and she stated that there was nothing verbal in those emails. She denounced the warning attached to the Respondent's claim as not being genuine as it was not on letter head, it was unsigned and did not have her name on it. She denied being called for the alleged meeting where she was the subject of discussion. She testified that the Respondent called for meetings via email and there was none.

4. The Respondent called John Kamonde who is in charge of service corporate sector in the Respondent. He testified that he joined in May 2012 and that the Respondent had a global service partner network which is an internet based service network system. He testified that in the service department there are parameters of service that must be met and there is a measure of the performance through turn around time for instance and this is usually 3 days. He stated that the Respondent had met the turn around time always. He referred to an email on the Respondent's bundle from Nicky Choi which related to repeated repairs and stated that it was addressed to the Claimant. He testified that he attended a meeting where the Claimant was discussed. He testified that he has not experienced discrimination and has not had difficulty in going on leave.
5. He testified in cross-examination that he did not know of any other complaint against the Claimant. He stated that if a job was verbally cancelled it would be left as pending in the system and it would not be tracked. He stated that there would be a record of the cancellation in the system and it would reflect cancelled and show the person who did. He stated that the only thing that would not show is who told him to cancel. He testified that he was never given any instructions to cancel any order and he could not tell if any of the others were called and told to cancel. He testified that the system captures all the occurrences on service provision. He stated that service providers are paid for jobs done and are evaluated on the repeat repairs ratio and the turn around time. He testified that he did not know why the Claimant was dismissed. He stated that the environment is good and there is no gender insensitivity. He stated that when the Claimant served the Respondent there were 19 staff and out of the 19 there were 3 ladies.
6. The second defence witness was Peninah wangari Mwangi the Voice of Customer Manager at the Respondent. She testified that she handles the claims made by customers if there is delay for instance or when the customer feels they have not been treated well. She testified that there is a system for handling repairs. She stated that she had not experienced any discrimination on basis of sex or race.
7. In cross examination she testified that once one cancels a job on the system there had to be a record of why the job was cancelled. She stated that the head office has no access to nor could she delete a job. The service partners are the ones who have passwords and it is illegal for one to cancel a job. She testified that the system does not allow verbal changes.
8. Parties opted to file written submissions and the Claimant filed submissions on 24th April 2015 and the Respondent on 14th May 2015. The Claimant filed supplementary submissions on 25th May 2015. The Claimant submitted that the Respondent had engaged in manufacture of evidence which was ferreted by the evidence of witnesses before the Court. The Claimant submitted that there were no reasons for her dismissal in terms of Section 41, 43 and 45 of the Employment Act. The Claimant submitted that there was an alleged meeting on 27th June 2013 by members of the Claimant's team and the HR Director Ms. Gikemi sat in the meeting and later on 2nd July 2013 sat in an appraisal of the Claimant and the issues raised in the meeting did not form part of the appraisal. The Claimant submitted that the issues raised in the alleged meeting are so serious that any respectable organization would have confronted the Claimant immediately and would at the very least have affected the appraisal. The Claimant further submitted that the alleged written warning was issued on 16th June 2013 and the Claimant was appraised on 2nd July 2013 yet the performance appraisal did not make any mention of this. The Claimant submitted that the minutes were manufactured for 6th August as the show cause letter is what precedes a disciplinary hearing and not the other way round. The Claimant relied on the case of **Joseph Otieno Nyolo v Rift Valley Railways (K) Ltd [2014] eKLR** among others on the

unfairness of the dismissal.

9. The Respondent submitted that the issues that were for determination were whether the Claimant's termination was unfair and unlawful, whether the Claimant is entitled to damages and whether the Claimant is entitled to reinstatement. The Respondent submitted that the Claimant had not proved her case and relied on the case of **Kenya Union of Commercial, Food & Allied Workers v Meru North Farmers Sacco Limited Cause No. 74 of 2013** where it was held that whatever the reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the process outline under Section 41 of the Employment Act. The Respondent submitted that the Claimant had been issued with a warning letter and that the Respondent had complied with the law in her termination. The Respondent submitted that it complied with Section 43(1) and (2) of the Employment Act, and that at the time of termination the reasons for termination were matters the Respondent at the time genuinely believed to exist. The Respondent submitted that it had various formats in which it recorded minutes of meetings as well as circulate documents within the Respondent. The Respondent further submitted that it was not necessary for the same to be signed. Reliance was placed on the case of **David Gichana Omuya v Mombasa Maize Millers [2014] eKLR** where the court held that in compliance with procedural fairness the employer is not required to keep a checklist. The Respondent submitted that the Claimant was negligent in her duties. The Respondent relied on the case of **CMC Aviation v Captain Noor Mohamed [2015] eKLR** where the Court of Appeal (Karanja, Musinga & Gatembu Kairu JJ.A) held that the respondent in that case was not entitled to 12 months gross pay as compensation as in the view of the Appellate Court, the contract of employment was terminable by one month's notice and therefore an award of one month's compensation would have been reasonable compensation.
10. The Claimant was dismissed by the Respondent and asserts that her dismissal was unlawful and unfair. The Respondent on its part asserts that the Claimant was dismissed fairly and in accordance with the law. The Claimant also claims there was sexual and race discrimination.
11. The Respondent is a multinational company dealing mainly in electronic goods and is one of the well recognized brand names from Korea. The Claimant was engaged in the service department of the Respondent. The dismissal was preceded by a letter to show cause. In the letter dated 6th August 2013, the Claimant was given up to 14th August 2013 to respond to the accusations therein. The Claimant sought legal advice and her lawyer sought to know from the Respondent when and to whom she issued the instructions. The Respondent replied through its counsel indicating that instructions were being sought and consequently the Claimant was advised that she had been dismissed. It was her case that she was not accorded the procedural fairness under Section 41 of the Employment Act. The Claimant was dismissed after her advocate made enquiries about her notice to show cause. Particulars of her alleged misconduct were sought and a dismissal ensued. It was the Respondent's case that a disciplinary hearing was held on 6th August 2013 after which the Claimant was given a show cause letter. This is rather odd as the envisaged order is for a notice to show cause to issue subsequent to which an explanation is received by the employee and finally a disciplinary hearing held if the explanation by the employee is unsatisfactory. The Claimant's dismissal was through the Respondent's advocate's letter of 22nd August 2013. The Claimant had asserted that the Respondent had assigned a hopelessly incompetent person to her department. The Respondent in its defence stated that the employee Il-Gyu (Nicky) Choi was an experienced employee. The curriculum vitae of the said employee was attached and he was stated that he had served in various capacities in the Respondent.

12. The Employment Act deplores discrimination. Section 5 of the Act provides as follows:-

5. (1) It shall be the duty of the Minister, labour officers and the Industrial Court—

(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and

(b) to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee"

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; "

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. "

(3) It is not discrimination to"

(a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job; "

(c) employ a citizen in accordance with the National employment policy; or "

(d) restrict access to limited categories of employment where it is necessary in the interest of state security. "

(4) An employer shall pay his employees equal remuneration for work of equal value.

(5) An employer who contravenes the provision of the section commits an offence.

(6) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

(7) For the purposes of this section"

(a) "employee" includes an applicant for employment; "

(b) "employer" includes an employment agency; "

(c) an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and "the appointment process, job classification and

grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities , training and development, performance, evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures.

13. Kenya has ratified various international instruments that outlaw discrimination at the work place. ILO Convention 111 [Convention Concerning Discrimination in Respect of Employment and Occupation, 1958] defines discrimination to include: (a) any distinction, exclusion, preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing the equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with the representative employers' and workers' organization, where such exist, and with other appropriate bodies.

14. It would seem that the Respondent's practice of having Korean nationals to supervise Kenyan employees is in breach of ILO Convention 111. International law springs from general principles of law and as clearly exhibited by Convention 111, deprecates discrimination. Other international instruments that fly in the face of discrimination are The Universal Declaration of Human Rights which provides that every person has the inherent right to dignity. The International Covenant on Economic, Social and Cultural Rights recognises under Article 7 the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, and in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work and equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

15. The UN Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] provides protection against discrimination of women while the International Convention on the Elimination of All Forms of Racial Discrimination provides under Articles 1, 2 and 4 as follows:-

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything

which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

4. States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

16. From the evidence adduced in Court it seems the Respondent does not permit the ascension of Kenyans to high offices and instead sends incompetent Korean nationals to supervise and oversee more qualified Kenyans. This is clearly discriminatory and not in keeping with international labour standards. The Court was unimpressed by the CV of Nicky Choi which was so bare that the most illustrious aspect was the military service of Nicky Choi as a mortar operator. The general principles of fairness and justice at work are based on the test of what is reasonable. Was it reasonable to have an ex-military man with limited understanding of international languages, English in particular, to supervise competent and suitably qualified Kenyans" I think not. The Respondent admits the limited capabilities of Choi.

17. The principles of international law abhor the situation the Respondent, an international organization practices. Discrimination on whatever ground is the very antithesis of fairness and justice. The Respondent is obliged to have its employees enjoy serving it in any capacity without regard to race and with a guarantee to equal protection and benefit of the law. The discrimination the Claimant suffered at the work place is telling. The Respondent has 19 staff members out of which only 3 are women. For as long as the practices evidenced in this case subsist, the dream of world citizenship will remain a fleeting illusion to be pursued and never attained. Of this I am confident, as long as the judiciary in Kenya exists, such acts will not be condoned. The practice by the Respondent encourages racial division and not inclusiveness and is contrary to international norms. The Respondent's witnesses did not convince the Court that the Respondent does not practice racial and sexual discrimination.

18. The dismissal of the Claimant was laughable. Instead of according the Claimant the right to a hearing under Section 41 the Respondent commenced a comical attempt to manufacture evidence of misconduct. According to the Respondent she was asked to show cause after a disciplinary meeting was held to discuss her misconduct and secondly, she was appraised shortly after a warning letter and complaint were made yet these two critical indicators of her performance were not part of the appraisal! In keeping with the cloak and dagger approach the Respondent has exhibited, it declined in spite of ample time and entreaty from Court to avail emails that would have shed light on these aspects. The Respondent pretended that the emails had been deleted from its servers automatically. Curiously, the Respondent had in its possession emails predating the subject emails yet they insisted that the system Samsung has is such that all corporate emails are deleted periodically and systematically. That was an outright lie that did not accord with the electronic data handling the Respondent is capable of.
19. The authorities cited by parties were considered and other than reinforcing the positions of law. In the case of **D. K. Njagi Marete v Teacher Service Commission [2013] eKLR** Rika J. considered the proportionality of remedies in employment cases, the learned judge held that it would be unconscionable to grant anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, and held that it would not be a fair and reasonable remedy. The case of **CMC Aviation v Noor** was cited by the Respondent. In that case, the Court of Appeal reduced the compensation awarded by the judge of the superior court to one month. Section 49 of the Employment Act provides as follows:-
49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or
 - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.
- (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to -
- (a) reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or "
 - (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage . "
- (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1)

and (3), take into account any or all of the following-

- a. the wishes of the employee; "
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee "caused or contributed to the termination; and
- c. the practicability of recommending reinstatement or re engagement.
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonable incurred by the employee as a consequence of the termination;
- k. any conduct of the employee which to any extent caused or contributed to the termination; "
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and "any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee. "

20. Reinstatement is not an appropriate remedy given the state of relations in the Respondent and the Court thus declines to grant any reinstatement to her former employment.

21. The Court finds that the dismissal of the Claimant was unfair and unlawful in the circumstances and that she was mistreated in her employment by being subjected to racial and sexual discrimination. She is entitled to compensation in terms of Section 49 as read with Section 50 of the Employment Act to the fullest extent possible. The Claimant proved her case and is entitled to the following remedies:-

- a. One month's salary in lieu of notice Kshs. 596,000/-,
- b. Payment for the 22 days she was still in employment in August 2013 Kshs. 437,066.60,
- c. Bonus payment duly earned in the first quarter of 2013 being equivalent to her monthly salary Kshs. 596,000/-,
- d. 12 months compensation for sexual and racial discrimination as well as unlawful termination Kshs. 7,152,000/-
- e. Costs of the suit.
- f. Interest at court rates on the sums in a), b), c) and d) above from the date of filing suit till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July 2015

Nzioki wa Makau

JUDGE



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